Supreme Court, U.S.
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No. 00-299

IN THE

Supreme Court of the United States

DENISE MITTEN,

Petitioner,

v.

MARK LaCHAPELLE, VALERIE OHANIAN
and L.M.K.O.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE MINNESOTA COURT OF APPEALS

REPLY BRIEF

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STATEMENT OF JURISDICTION

To the extent that 28 U.S.C. § 2403(b) may apply, notifications required by Rule 29.4(c) have now been made.

STATEMENT OF THE CASE

Respondents claim to disagree with the facts presented in Denise Mitten's brief. Nonetheless, the disagreements are immaterial to the issue presented for review. In actuality, the parties agree on the material facts. They agree that Mitten was living in Michigan (with court permission) when the trial court entered its order, and they agree that the court awarded Mitten sole physical custody. They also agree that custody was conditioned upon L.M.K.O.'s residence within a seven-county area of Minnesota. In addition, the trial court never held that living in Michigan would endanger L.M.K.O. Beyond this, Mitten acknowledges that the trial court found that residence in Minnesota would be in L.M.K.O.'s best interest. While Mitten may disagree, she does not argue any contrary position.

REASONS FOR GRANTING THE WRIT

Denise Mitten continues to believe that the issue presented is of exceptional national importance because it affects a large number of American families and because it implicates fundamental constitutional rights. Respondents offer nothing to suggest otherwise. Instead, they argue: (1) that this Court should disregard constitutional violations that arise in family law cases; (2) that Mitten has not properly challenged the constitutionality of a Minnesota statue; (3) that Mitten has not shown sufficient conflict between the states; and (4) that, on the merits, the trial court's decision was constitutional. As shown below, these arguments should not dissuade the Court from granting certiorari.

I. This Court Protects Citizens From Constitutional Violations Even When They Arise In Cases Governed By State Family Law

Family law is, and should be, governed by state law. Denise Mitten does not suggest that the Court usurp this function.

However, unlike respondents, she does not believe that the Supreme Court should close its eyes to constitutional violations when they arise in a family law case. In fact, the respondents probably do not believe this either.

Had this case involved rights other than parental rights or the right to travel, it is unlikely that respondents would be making this argument. For example, if the trial court made custody contingent upon Mitten changing her religion, respondents presumably would not argue that Minnesota had the last word on determining whether the order was violative of the First Amendment. The same would be true if the trial court had conditioned custody on Mitten foregoing her right to have more children . . . or on foregoing her right to free speech.[1] Even the respondents would have to concede that the Supreme Court, as the guardian of the constitution, would have a legitimate basis to grant certiorari in these circumstances.[2]

Family law, like other areas of law committed to state control, is not immune from constitutional regulation.[3]

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1. Conceivably, each of these illustrations could be in the "best interest" of a child. For example, a judge could conclude that an impoverished custodial mother would not be able to provide as well for her child if she had more children. Thus, it could be in her child's "best interest" if she was told she could only retain custody if she agreed to forego her right to have more children. Similarly, it might be in a child's best interest if his parent abandoned an unpopular political stand. For instance, the child might be ostracized by other children if the parent spoke out on a politically sensitive issue. Thus, telling the parent to forego the right to free speech, or in the alternative lose custody, could be in the child's "best interest."

2. Indeed, the affect on the parent is no less real because it is accomplished through coercion rather than court order. *Cf.*, *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969) (". . . any classification which serves to penalize the exercise of that right [to travel], unless shown to be necessary to promote a compelling governmental interest is unconstitutional.")

3. *See Lehman v. Lycoming County Children's Svcs.*, 458 U.S. 502, 512 n.14 (1982) ("The Court has considered constitutional challenges to custody or parental-rights proceedings . . ."); *cf.*, *Troxel v. Granville*, __ U.S. __, 120 S. Ct. 2054 (2000) (examining the constitutionality of a grand parent visitation statute).

In suggesting that it is, LaChapelle's brief incorrectly cites to cases that discuss whether Congress may enact statutes that displace state law in fields traditionally committed to state discretion.[4] He does not cite cases indicating this Court should abstain from addressing situations where a state is accused of regulating traditional state law areas in an unconstitutional manner. The cases he cites are inapposite.

Agreed: family law should be regulated by the states. But in doing so, states are not free to violate the constitution. This Court — not the State of Minnesota — has the final word on interpreting the constitution. Thus, while "[o]ur dual system of government requires a distinction between what authority is national and what authority is local,"[5] our republican form of government does not prevent our country's highest court from finding that a state has acted contrary to the fundamental rights of a citizen.

II. Mitten Does Not Challenge The Constitutionality Of A Minnesota Statute, But Even If She Did, This Court May Still Grant Certiorari

Respondents suggest there is lack of jurisdiction to grant certiorari. Essentially, they claim that because Denise Mitten did not notify Minnesota's attorney general that she challenged the constitutionality of a state statute, the Supreme Court rules[6] and Minnesota law,[7] prevent her from pursuing her claim. This argument lacks merit for several reasons. First, Mitten does not challenge the constitutionality of a Minnesota statute. Furthermore, even if she did, she is not prevented from seeking certiorari since she has now complied with this Court's notification requirement. In addition, the Minnesota court rules cited by respondents are inapplicable, and in any event,

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4. *See* LaChapelle Brf. in Opp. to Pet. for Cert. at 9.
5. *See* LaChapelle Brf. in Opp. to Pet. for Cert. at 9.
6. Sup. Ct. R. 29.4(c).
7. Minn. R. Civ. P. 24.04; Minn. R. Civ. App. P. 144.

respondents waived the right to raise this argument by not raising it below.

A. Mitten does not challenge the constitutionality of a Minnesota statute.

Nothing in the Minnesota statutes cited by respondents permit a court to award conditional custody hinged upon the child and mother's residence. In its opinion, the Minnesota Court of Appeals noted that when the trial court entered its conditional custody order, it was exercising its inherent equitable powers:

> The lack of statutory authority explicitly allowing conditional custody awards does not preclude such an award when it is in the child's best interest. *See DeLa Rosa v. DeLa Rosa*, 309 N.W.2d 755, 758 (Minn. 1981) (in family law cases, the district court has inherent power to grant relief as facts and equities require).[8]

The trial court acted pursuant to its equitable powers. Thus, in challenging the conditional custody order, Mitten was not challenging the constitutionality of a statute. Consequently, since the constitutionality of a statute is not called into question, notice to the Minnesota Attorney General under each of the provisions cited by respondents is unnecessary.

B. Respondent's notice argument is moot because Mitten has notified the Minnesota Attorney General of her Petition for Certiorari

Even if Denise Mitten was challenging the constitutionality of a Minnesota statute, this Court could still grant certiorari. This is true because well-established law says that late notice cures any deficiency. Thus, as shown below, since notice has now been made, respondents' argument is moot.

Sup. Ct. R. 29.4(c) implements 28 U.S.C. § 2403(b). Under that statute, federal courts must notify a state's attorney general anytime the constitutionality of one of its statutes is drawn into question. The purpose of the statute is to allow the state to

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8. Mitten's Pet. for Writ of Cert. at App. A, 17a-18a.

intervene and defend the constitutionality of its statute.[9] Several circuit courts have examined the notice requirement, and each have come to the same conclusion: it is not jurisdictional.[10] As a result, "[a]bsent harm or prejudice to the government's opportunity to present its views," belated notice is sufficient to remedy any technical violation.[11] Mitten has now notified the Minnesota Attorney General that the constitutionality of one of the state's statutes may be drawn into question. This precautionary step satisfies the notice requirement because Minnesota has an opportunity to intervene if it wishes. This notice, albeit late, renders respondent's argument under Sup. Ct. R. 29.4(c) moot.

C. Minnesota's notification requirement does not apply, and even if it did, respondent's waived this argument by not raising it below.

In addition to claiming a violation of Sup. Ct. R. 29.4(c), respondents argue that Mitten should have notified the Minnesota Attorney General that she was challenging the constitutionality of a statute when she appeared before the trial court and Minnesota's appeals court. Yet, despite claiming the benefit of these rules, respondents never explain why they apply or why these issues were not raised below. In reality, the rules are inapplicable, and by not raising these issues at the appropriate time, respondents waived the right to raise them now.

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9. *Cf.*, *Tonya K. v. Board of Educ. of City of Chicago*, 847 F.2d 1243, 1248 (7th Cir. 1988) (discussing the parallel provision requiring notice to the U.S. Attorney General when a federal statute's constitutionality is drawn into question).

10. *Id.* at 1248; *Merrill v. Town of Addison*, 763 F.2d 80, 83 (2d Cir. 1985); *In re Young*, 82 F.3d 1407, 1412 (8th Cir. 1996), *cert. granted, vacated on other grounds*, 521 U.S. 1114 (1997); *Puffer's Hardware v. Donovan*, 742 F.2d 12 (1st Cir. 1984).

11. *Merrill*, 763 F.2d at 83; *Tonya K.*, 847 F.2d at 1248 (stating that "[f]ailure to notify the Attorney General is not a jurisdictional defect. . . , and belated notice satisfies any requirement") (internal citation omitted).

Respondents rely upon two Minnesota court rules. The first requires parties in a trial court proceeding to notify the Minnesota State Attorney General if they challenge the constitutionality of a state statute.[12] The second rule contains the same requirement and applies to appeals.[13] In their briefs, respondents correctly point out that Minnesota courts will not hear constitutional challenges unless the requirements are met.[14] They fail to reveal, however, that the rules only apply to facial challenges.[15] According to the Court of Appeals of Minnesota, "[i]n order to challenge the *prima facie* constitutionality of a Minnesota statute, one must first notify the Attorney General."[16] In the absence of notification, courts will hear as-applied challenges.[17]

Even if Mitten was challenging a statute, she would not be making a facial challenge to it. Rather, she would be alleging that the trial court's conditional custody order under the statute violated her constitutional rights since there was no indication that residing outside of the seven-county area chosen by the judge would endanger L.M.K.O. This would be an "as applied" challenge[18]. Thus, lack of notification would not bar review.

The notice argument is also inappropriately raised. Minnesota courts do not permit parties to raise new arguments on appeal. According to its Supreme Court, "[a] reviewing court

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12. Minn. R. Civ. P. 24.04.

13. Minn. R. Civ. App. P. 144.

14. Ohanian Brf. in Opp. to Pet. for Cert. at 13; LaChapelle Brf. in Opp. to Pet. for Cert. at 10-11.

15. *See Welsh v. Johnson*, 508 N.W.2d 212, 215, n.1 (Minn. Ct. App. 1993); *Market v. Behm*, 394 N.W.2d 239, 243 (Minn. Ct. App. 1986).

16. *Id.*

17. *See id.*; *Welsh*, 508 N.W.2d at 215 n.1.

18. *See Ada v. Guam Society of Obst. & Gyn.*, 506 U.S. 1011 (1992) (Scalia, J. dissenting) (explaining that in an as-applied challenge to a statute "the plaintiff contends that application of the statute in the particular context in which he has acted, or in which he proposes to act, would be unconstitutional.")

must generally consider only those issues that the record shows were presented and considered by the trial court in deciding the matter before it."[19] Likewise, this Court refuses to hear arguments when the parties failed to raise them below.[20] Neither respondent ever suggested that the lower courts could not consider Mitten's constitutional challenge based upon lack of notice.[21]

In short, respondents' notice argument fails to preclude review. Mitten does not take issue with a Minnesota statute; therefore notification is unnecessary. Furthermore, as a precaution, Mitten has now complied with Sup. Ct. R. 29.4(c), making respondents' argument under this rule moot. In addition, since Mitten does not make a facial challenge to the constitutionality of a statute, the Minnesota court rules cited by respondents are inapplicable. And even if they applied, the argument was waived since neither respondent raised it below. For all these reasons, the notice argument presents no obstacle to granting certiorari.

III. Regardless Of What Stage In The Proceedings It Occurs During, States Should Not Dictate A Parent's Residence Absent A Demonstration Of Endangerment To The Child

Respondents recast Denise Mitten's argument as a challenge to the bedrock family law principle that courts should determine custody awards based upon the child's best interests. This is a misinterpretation of the argument. Mitten challenges the

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19. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (internal quotation and citation omitted); *see Correll v. Distinctive Dental Svcs, P.A.*, 607 N.W.2d 440, 447 n.4 (Minn. 2000).

20. *See, e.g., Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 319 n.3 (1999); *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 38-39 (1989).

21. Furthermore, since both lower courts found the judge's order constitutional, any alleged lack of proper notice was harmless error at worst. *Cf., Merrill*, 763 F.2d at 83 (pointing out that when a statute is upheld, there is "no practical purpose to be served in remanding") (internal quotation and citation omitted).

propriety of conditioning custody on foregoing constitutional rights. As recognized by the Minnesota appeals court, Mitten questioned the propriety of the trial court's decision to award *conditional* custody.[22] Respondents suggest that residence was but one factor in a multi-faceted initial custody determination. Not true: after awarding custody to Mitten, the judge stated that it would be conditioned upon her living with L.M.K.O. in a seven-county area he chose. In fact, the decision states that "Mitten shall have sole physical custody of [L.M.K.O.] *providing that* Mitten shall relocate to the seven county metropolitan area of the Twin Cities."[23]

Even the trial court recognized that "Mitten has been [L.M.K.O.'s] primary caretaker since she was born."[24] It also appropriately recognized that it was in L.M.K.O.'s best interest to be with Mitten.[25] However, the judge went too far when he then said that Mitten's custody would be contingent upon her raising her daughter in his pre-determined location. Respondents believe this was permissible. But again, they would be hard pressed to make the same argument had the trial court conditioned custody upon giving up some other constitutional right (e.g., freedom of religion, freedom of speech, etc.).

Mitten is not making the broad-based attack on the "best interest" standard that the respondents claim she is. She takes no issue with the fact that a court must determine what is in the best interest of a child when resolving custody disputes.[26] However, having made that determination, a judge crosses a constitutional boundary when he begins telling the custodial parent where to live. These should not be state decisions absent

22. Mitten's Pet. for Writ of Cert. at App. A, 15a-23a.

23. Mitten's Pet. for Writ of Cert. at App. A, 75a (emphasis added).

24. Mitten's Pet. for Writ of Cert. at App. A, 52a.

25. The court acknowledged that LaChapelle, the father, was not seeking custody.

26. Contrary to LaChapelle's suggestion, there is no confusion over the fact that Mitten had temporary custody until the trial court entered its order awarding final custody. LaChapelle Brf. in Opp. to Pet. for Cert. at 13-14.

a showing of endangerment. Whether this occurs during a modification request or initial custody determination is irrelevant.

Respondents fail to offer any rationale for treating a relocation request different than a contingent custody situation. In the latter, a judge tells a parent to move to an area and stay there. In the former, a judge tells a parent to remain in a specific locale. The result is no different, because the parent is confined to living where the state dictates. Because of the lack of difference between these two situations, the case law distinctions offered by respondents are artificial. The result is the same: the parent is forced to choose between a constitutional right and a child. Thus, while respondents try to distinguish cases like Wyoming's *Watt v. Watt*[27] because they involve relocation requests, the distinction they offer provides no real difference. Indeed, the affect on the parent is no less tangible because the condition is imposed during a different stage in the proceedings.

If the Court grants certiorari, the question before it will be whether the trial court's conditional custody scheme is constitutional. Regardless of when it occurs, states impede the right to travel and the right to raise a family when they begin dictating residence. That is what occurred here. Certiorari is warranted.

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27. 971 P.2d 608, 616 (1999).

CONCLUSION

Even respondents must concede that the issue upon which the parties disagree is exceptionally important. Constitutional rights are at issue, and the impact upon American families is great. By accepting this case, the Court will not be "nationalizing" family law. To the contrary, it would be acting within an area in which it is uniquely qualified: interpretation of the United States Constitution. Accordingly, Denise Mitten respectfully asks the Court to grant her petition for writ of certiorari.

Respectfully submitted,

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